IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-930

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

EAZOR EXPRESS, INC., ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its order of February 23, 1976, denying certiorari in this case, Justices Brennan and White dissenting.

I.

The Court of Appeals for the Fifth Circuit has issued an opinion on denial of rehearing, clarifying its prior decision in *United States Steel Corp.* v. *United Mine Workers of America,* 519 F.2d 1249, an action

which like the present seeks damages under § 301 for damages due to an unauthorized strike in violation of a no-strike obligation. In its new opinion, the Court squarely stated its holding to be: "For the union to be liable, the evidence had to show that the union in some way made itself a party to the strike or work stoppage violative of the contract" (526 F.2d 377 (Jan. 26, 1976)). That holding is squarely inconsistent with the result reached by the court below, which imposed liability on these defendants although approving the District Court's finding that no defendant had authorized and participated in the strike. There is thus a clear conflict in the circuits on the important and recurring issues of liability in this case, unless the *United States Steel* Court's disavowal of such a conflict (on both the contract and mass action theories) is accepted. On the contract issue, the only basis of distinction between this case and *United States Steel* (as well as *United Construction Workers* v. *Haislip Baking,* 223 F.2d 872 (4 Cir.)), it is that in the present case the no-strike promise was *express* whereas in *United States Steel* and *Haislip* it was *implied.*[1]

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[1] In order to keep our reply memorandum within reasonable limits, we did not therein deal with respondent's effort to distinguish *Haislip* on the alternative ground that the "international union involved in that case was not even a direct party to the collective bargaining agreement in issue there * * *" (Opp. 39). But that fact is beside the point, because the holding which we cited involved defendant United Construction Workers (UCW), which *was* a party to the agreement. Judge Parker held that in determining whether UCW was liable for breach of the no-strike obligation implicit in that agreement: "The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike" (223 F.2d at 877-878).

We note in this connection that by reviving this distinction the court below (and the Fifth Circuit in *United States Steel*) have invited new problems if *Boys Markets* is extended in *Buffalo Forge* v. *United Steelworkers,* No. 75-339, which presently awaits oral argument on the issue whether a strike injunction is available where the strike is not over an arbitrable grievance. If the answer is "yes" in *Buffalo Forge,* where there is an express no-strike clause, would it be the same where the no-strike promise is implied from the promise to arbitrate? *Gateway* had apparently set the distinction to rest in suits under § 301, in conformity with contract law generally. (Pet. 17). Yet, while the decision below stands, it retains life and can only sow confusion in damage suits as this, and in injunction suits like *Buffalo Forge.* Moreover, if this Court should say anything in the latter case to make clear that its decision therein, like *Gateway,* applies to *all* no-strike obligations, petitioners should receive the benefit of that holding.

Because of the somewhat equivocal language of the Fifth Circuit's original opinion in *United States Steel Corp.* with respect to the mass action theory, whereby the court appeared to be disapproving the theory while accepting, for unstated reasons, the opinion in *Eazor,* and because that theory is so patently contrary to the Congressional intent and the decisions of the Fourth and Sixth Circuits which we cited, we did not also rely on *United States Steel* as creating a conflict on that issue. The Fifth Circuit's succinct restatement of its holding in this, however, makes it clear that whatever that court may have believed, the decisions in that case and this are irreconcilable.

II.

A. We earnestly urge this Court to grant reconsideration of its denial of certiorari with respect to the Court of Appeals' affirmance of the trial court's finding that $1,079,000 was the amount of plaintiff's loss attributable to the strike period, although the District Court had failed, in violation of Rule 52(a), to find specially the facts which underlay that figure. Since respondent has perforce acknowledged (Opp. 47, 54) that the District Court did not comply with Rule 52(a) in this respect, its sole argument has been that petitioners were not thereby prejudiced. Yet—and this is why we submit that denial on this point perpetuates a grave injustice—the lack of findings precluded review of the reasoning whereby the trial court arrived at $1,079,000 as the "starting point" of its damage calculation, rather than $696,000 which was the maximum which plaintiff's own accountant testified was fairly attributable to the strike period. (See Pet. Reply 5-9). The result, under the Court of Appeals' view that plaintiff was entitled to recover for all but the first day of that period at Eazor and all but the first two days at Daniels, is that plaintiff has been awarded (prior to prejudgment interest) well over $350,000 which its own accountant testified plaintiff did not lose because of the strike, and which neither the trial court nor the Court of Appeals have ever explained.

These are the stakes which induced respondent to submit an extraordinary Memorandum in Rebuttal in opposition to the Petition for Certiorari. In that rebuttal respondent did not point to any evidence or even any argument which it had made below to explain why $696,000 should not be the maximum starting

point. Nor did it controvert our showing that respondent had, in its Brief in Opposition, falsely stated that its own accountant became *defendants'* witness when he testified to the $696,000 maximum (Opp. 28-29, corrected at Pet. Rep. 8-9) and had sought (at Opp. 48-49) to mislead this Court as to what was before the District Judge, by presenting an elaborate array of figures which represented plaintiff's adjustment of its own earlier claim *downward* to $1,079,000, and therefore could not "explain why the loss for the strike period was not reduced to 'around $700,000' (Opp. 29) (actually $696,255) as Bache, Eazor's accountant testified was required, and as the exhibits which he prepared established" (Rep. p. 6), so that "it remains unknown why the trier of fact rejected the opinion of accounting witnesses for both sides and adopted as a 'starting point' a figure more than $375,000 greater than that which the accountants agreed was permissible as proper accounting practice" (*ibid.*). Rather, in an effort to distract attention from that issue, the rebuttal set up a smoke screen by misstating our arguments on a related point, and then rebutting the argument as misstated. We now show just how respondent did it:

Respondent begins its rebuttal ("Rebut.") as follows:

> "Petitioners state in their Reply Memorandum (page 6) that the materials submitted to the courts below do not show '* * * why ten other adjustments urged by defendants' accountants * * * were not made.'
>
> This is not so." (Rebut. 1)

There follow excerpts from the submissions of both sides to the trial court and the Court of Appeals with

respect to these "ten other adjustments", followed by a portion of the Court of Appeals' opinion wherein the Court states that it has studied the record and found evidence to support the District Court's figure of $1,079,000 as plaintiff's loss during the strike period.

We next set forth the original, showing by italics the language which was excised in respondent's quotation: "*Nor of course do the materials show* why ten other adjustments urged by defendants' accountants (*and further reducing the total to $208,375*) were not made." (Pet. Rep. 6).

Thus, what respondent has done is to replace the phrase "the materials" in the original with "the materials submitted to the courts below" (Rebut. 1). But as clearly appears from the context, our phrase "the materials" referred to "the materials described at Opp. 48-49", (which is how they were described earlier in the same paragraph at p. 6 of our Reply Memorandum), which consisted solely of plaintiff's argument to the trial court as to why certain adjustments should be made from plaintiff's original accounting evidence (prior to correction by its own accountant after examination by defendants' accountants); our phrase did not refer to the arguments made by plaintiff to contest defendants' "ten other adjustments". Thus, by an artful change of what petitioners said, respondent set up a straw man which the remainder of its rebuttal demolished. Additionally, by eliminating our phrase "and further reducing the total to $208,375", respondent avoided reminding the Court of the context of our statement, and particularly that the "ten other adjustments" were a *further* reduction (as to which the accountants were in disagreement)

from the $696,000 figure (as to which the accountants were in agreement although the trial court inexplicably was not.)

What is particularly ironic is that plaintiff's strategems are all addressed to a matter extraneous to the question presented by the Petition for Certiorari, which is whether the courts below violated Rule 52(a) with respect to the damage calculation; everything that respondent has said and done is to show a lack of prejudice due to the court's violation of that Rule. Yet, significantly, it is only because the trial court did not explain how it arrived at the critical $1,079,000 that any of respondent's artifices were possible, since if the District Court had made proper findings, there could be no argument as to how it reached that result. Moreover, Rule 52(a) is designed to protect the appellate courts, including this one from the necessity of searching the record. Thus, by elaborately seeking to deny that prejudice resulted from the absence of findings, respondent has succeeded instead in creating additional prejudice. And since the violation is clear, and the amount involved substantial, this Court should grant certiorari and—if it chooses not to hear the other issues presented by the petition—vacate the judgment below and remand the case to the trial court with directions to re-determine damages in compliance with Rule 52(a).

B. & C. With respect to the issues concerning the absence of findings as to why pre-judgment interest was awarded, we remind the Court that one of them is also pending in *Bangor Punta* v. *Chris Craft,* No. 75-353. *See* Pet. pp. 38-39. That case is presently ripe for decision, the SEC having, since the denial of certiorari, responded to this Court's invitation to file a brief herein.

Here, there is an even more complete failure to make findings, since not only did the Court of Appeals fail to explain why it granted prejudgment interest on a judgment after it was substantially increased on appeal, there were no findings at either the District Court or Court of Appeals level with respect to prejudgment interest on the original judgment. We urge that if the Court grants certiorari in *Chris-Craft,* it should grant certiorari on the interest questions in this case as well, in order to obtain a fuller view of a problem which is of recurring importance in the lower federal courts, and is not often litigated on appeal, since the amounts involved are usually not as great as here and in *Chris-Craft;* alternatively, the Court should withhold its decision of the present petition for rehearing until after *Chris-Craft* is decided.

CONCLUSION

This Petition for Rehearing should be granted. Certiorari should be granted now, or the present Petition held in abeyance until *Buffalo Forge, supra,* No. 75-339, and *Chris-Craft,* No. 75-353, are finally determined.

Respectfully submitted,

SIDNEY DICKSTEIN
GEORGE KAUFMANN
1735 New York Avenue
Washington, D.C. 20006

Attorneys for Petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

BEN PAUL JUBELIRER
2000 Lawyers Building
Pittsburgh, Pennsylvania 15219

Attorney for Petitioner Local No. 249

EUGENE GREEN
602 Stambaugh Building
Youngstown, Ohio 44503

Attorney for Petitioner Local No. 377

Certificate

I hereby certify that this Petition is presented in good faith and not for delay and restricted to the grounds specified in Rule 58(2) of this Court.

GEORGE KAUFMANN